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United States v. Newland

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UNITED STATES V. NEWLAND

Judicial notice allows courts to acknowledge a proposition as conclusive without requiring any party to introduce evidence of that proposition's truth.[1] Because judicial notice establishes propositions without the introduction of evidence, the doctrine can significantly influence the outcome of litigation while simultaneously reducing the length of trial. Similarly, unpublished opinions take less of the court's time than published opinions because they do not require the court to explain extensively its reasoning and do not require as much in-depth review and circulation among the judges.[2] However, while courts use judicial notice and unpublished opinions to increase the efficiency of the judicial system, both measures could have similar shortcomings: while intended to increase the temporal efficiency of judicial decision making, these two tools may actually decrease the quality of judicial opinions.

In 2007, the United States Court of Appeals for the Fourth Circuit wrote an unpublished opinion, *United States v. Newland*.[3] In *Newland*, a police officer pulled over the defendant for speeding while heading north on I-95.[4] After returning to the police vehicle and making an unsuccessful warrant check in the defendant's name,[5] the officer detained the defendant for thirteen minutes while waiting for a canine unit to arrive to search the vehicle.[6] The canine search revealed narcotics and a bag of cash in the car, and the defendant was taken into custody.[7]

At trial, the defendant's counsel moved to suppress the evidence seized as a result of the canine unit search of the defendant's vehicle.[8] Thus, the determinative issue became whether the officer had reasonable suspicion to detain the defendant and to have the canine check the vehicle after the officer discovered that there were no outstanding warrants for the defendant's arrest.[9] After the district court granted the defendant's motion to suppress, the

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1. Christopher Onstott, *Judicial Notice and the Law's "Scientific" Search for Truth*, 40 AKRON L. REV. 465, 465 (2007).

2. *See* Martha Dragich Pearson, *Citation of Unpublished Opinions as Precedent*, 55 HASTINGS L.J. 1235, 1297 (2004) (quoting Hart v. Massanari, 266 F.3d 1155, 1176 (9th Cir. 2001)); J. Jason Boyeskie, Comment, *A Matter of Opinion: Federal Rule of Appellate Procedure 32.1 and Citation to Unpublished Opinions*, 60 ARK. L. REV. 955, 959–60 (2008) (citing Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This! Why We Don't Allow Citation to Unpublished Dispositions*, CAL. LAW., June 2000, at 43, 43–44). Published opinions can take weeks to write because courts circulate the proposed opinions among the judges for review, yet judges can write unpublished opinions in a few hours because they only need to cite a couple of opinions explaining their reasoning. Boyeskie, *supra*, at 960 (citing Kozinski & Reinhardt, *supra*, at 43).

3. 246 F. App'x 180 (4th Cir. 2007).

4. *Id.* at 182.

5. *Id.* at 182–83.

6. *Id.* at 183, 187.

7. *Id.*

8. *Id.* at 182–83.

9. *See id.* at 187.

prosecution appealed.[10] On appeal, the Fourth Circuit reversed the district court's suppression of the evidence, finding that the officer had reasonable suspicion to detain the defendant and to have the canine unit check the vehicle.[11]

The majority stated that reasonable suspicion is more than an officer's "inchoate and unparticularized suspicion" or a "hunch that criminal activity is afoot,"[12] and that the factors creating a reasonable suspicion for a search and seizure must "'eliminate a substantial portion of innocent travelers.'"[13] The Fourth Circuit found that the officer had reasonable suspicion to detain the defendant because the defendant had shaky hands, presented the officer with multiple addresses, had multiple cell phones in the vehicle, and had travel plans that would prevent him from returning his rental car before the rental agreement expired.[14] The majority also relied on the officer's suspicion that the defendant's Virgin Islands driver's license was fake, even though the district court had examined the license and failed to find the abnormalities described by the officer.[15]

In addition to the above factors, the Fourth Circuit took judicial notice that I-95 is "a major thoroughfare for narcotics trafficking,"[16] finding that I-95's reputation as a well-known drug corridor was sufficient to conclude that travel on I-95 is "a valid factor in a reasonable suspicion analysis."[17] In taking judicial notice of this fact, the majority relied on five Fourth Circuit decisions,[18] three of which were unpublished opinions.[19] While the majority noted that "each state in this circuit through which I-95 passes has acknowledged its reputation as a drug corridor,"[20] it also recognized that this was the first time that the Fourth Circuit had taken judicial notice of this fact.[21]

The dissent in *Newland* argued that the majority's reliance on these decisions to support taking judicial notice of I-95 as a drug corridor was

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10. *Id.* at 182.

11. *Id.* at 190.

12. *Id.* at 188 (quoting United States v. Brugal, 209 F.3d 353, 359 (4th Cir. 2000)) (internal quotation marks omitted).

13. *Id.* (quoting United States v. Foreman, 369 F.3d 776, 781 (4th Cir. 2004)).

14. *Id.* at 189 (citing Illinois v. Wardlow, 528 U.S. 119, 124 (2000); United States v. Sokolow, 490 U.S. 1, 8 (1989); Florida v. Rodriguez, 469 U.S. 1, 6 (1984); *Foreman*, 369 F.3d at 785; *Brugal*, 209 F.3d at 359).

15. *Id.* at 188.

16. *Id.*

17. *Id.* (citing *Brugal*, 209 F.3d at 358 n.5).

18. *Id.* (citing United States v. Vidal, 119 F. App'x 510, 511 (4th Cir. 2005) (per curiam) (unpublished table decision); *Brugal*, 209 F.3d at 358 n.5; United States v. Raymond, 152 F.3d 309, 311 (4th Cir. 1998); United States v. Thorpe, 36 F.3d 1095, at *1 (4th Cir. 1994) (per curiam) (unpublished table decision); United States v. Bodie, 983 F.2d 1058, at *1 (4th Cir. 1992) (per curiam) (unpublished table decision)).

19. *See Vidal*, 119 F. App'x 510; *Thorpe*, 36 F.3d 1095; *Bodie*, 983 F.2d 1058.

20. *Newland*, 246 F. App'x at 188 (citing *Vidal*, 119 F. App'x at 511; *Brugal*, 209 F.3d at 358 n.5; *Thorpe*, 36 F.3d 1095, at *1; *Bodie*, 983 F.2d 1058, at *1; Limonja v. Commonwealth, 383 S.E.2d 476, 482 (Va. Ct. App. 1989)).

21. *Id.*

misguided, suggesting that the majority "mischaracteriz[ed]" three of these decisions.[22] As noted by the dissent, each of these five cases contains important differences that distinguish them from the facts in *Newland* and make their use as precedent inappropriate.[23]

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22. *Id.* at 194 (Gregory, J., dissenting) (citing *Brugal*, 209 F.3d at 360; *Raymond*, 152 F.3d at 311; *Bodie*, 1992 WL 389290, at *1).

23. First, *Newland* cited *United States v. Brugal* to support taking judicial notice in its reasonable suspicion analysis. *Id.* at 188 (citing *Brugal*, 209 F.3d at 358 n.5). In *Brugal*, the court noted that "[I-95] is a major thoroughfare for narcotics trafficking" and found that a police officer had reasonable suspicion to instruct a driver stopped at a checkpoint off of I-95 to pull to the side of the road. *Brugal*, 209 F.3d at 359–60. However, *Brugal* relied heavily on two facts that made *Brugal* significantly different than *Newland*: (1) the defendant left I-95 at a dark exit immediately after seeing a police checkpoint sign, and (2) the defendant claimed that he exited I-95 to look for a gas station even though he had a quarter tank of gas left and could not see any gas stations from the highway. *Id.* at 360–61. Furthermore, *Brugal* was not appropriate precedent for the *Newland*'s use of judicial notice because *Brugal* did not hold that I-95 was a drug corridor because the parties did not dispute the status of I-95. *Newland*, 246 F. App'x at 195 (Gregory, J., dissenting) (citing *Brugal*, 209 F.3d at 360).

Second, *Newland* cited *United States v. Raymond* to support its characterization of I-95 in its reasonable suspicion analysis. *Id.* at 188 (citing *Raymond*, 152 F.3d at 311). In *Raymond*, the court found that a police officer had reasonable suspicion that the defendant was carrying a weapon because after the officer pulled over the defendant's vehicle, the defendant clutched his stomach while exiting the car awkwardly. *Raymond*, 152 F.3d at 311–12. The *Newland* court's reliance on *Raymond* was improper because *Raymond* "did not make any findings about I-95's status as a drug corridor." *Newland*, 246 F. App'x at 194–95 (Gregory, J., dissenting). Rather, *Raymond* merely noted that the officers were members of a drug trafficking police unit that patrolled I-95. *Id.* (citing *Raymond*, 152 F.3d at 311). *Newland* therefore extended the dicta in *Raymond* too far by inferring that *Raymond*'s observation that the stop involved a drug trafficking unit justified judicial notice that I-95 is a drug trafficking thoroughfare.

Third, *Newland* cited *United States v. Vidal* to support taking judicial notice. *Id.* at 188 (citing *Vidal*, 119 F. App'x at 511). *Newland*'s reliance on *Vidal* was misplaced because *Vidal* relied on *Brugal*'s characterization of I-95 as a factor establishing reasonable suspicion, *Vidal*, 119 F. App'x at 511 (citing *Brugal*, 209 F.3d at 358), even though *Brugal* did not hold that I-95 was a major drug thoroughfare, *Newland*, 246 F. App'x at 195 (Gregory, J., dissenting) (citing *Brugal*, 209 F.3d at 360). Furthermore, *Vidal* has little precedential value because it is a brief unpublished opinion that contains little reasoning for its decision to affirm a lower court's conviction of the defendant. *See Vidal*, 119 F. App'x at 511.

The fourth case *Newland* cited to support taking judicial notice was *United States v. Bodie*. *Newland*, 246 F. App'x at 188 (citing *Bodie*, 983 F.2d 1058, at *1). In *Bodie*, the defendants were driving slowly in a Richmond, Virginia neighborhood. *Bodie*, 983 F.2d 1058, at *1. After seeing numerous Drug Enforcement Administration (DEA) agents in a nearby parking lot, the defendants fled the neighborhood, and the agents chased them onto I-195 and then onto I-95. *Id.* The *Newland* court's citation to *Bodie* was improper because the reasonableness of the search and seizure did not depend on whether the stop occurred on I-95; the police stopped the vehicle due to the car chase that began in a neighborhood. *See id.*; *see also Newland*, 246 F. App'x at 195 (Gregory, J., dissenting) (citing *Bodie*, 983 F.2d 1058, at *1) (arguing that *Bodie* "dealt not with the status of I-95" as a drug trafficking thoroughfare, but with the status of the neighborhood street where the chase began)).

Lastly, *Newland* cited *United States v. Thorpe*. *Newland*, 246 F. App'x at 188 (citing *Thorpe*, 36 F.3d 1095, at *1). In *Thorpe*, a police officer pulled over a defendant for speeding north on I-95 in Maryland, and the Fourth Circuit found that the officer had reasonable suspicion to search the defendant's car because of the defendant's suspicious actions, the defendant's travel plans, and I-95's reputation as a drug corridor. *Thorpe*, 36 F.3d 1095, at *5. However, *Thorpe*'s characterization

The dissent also offered three reasons why the police officer did not have reasonable suspicion to detain the defendant. First, judicial notice of I-95's reputation alone does not satisfy reasonable suspicion because the defendant's mere presence on I-95 could not remove any drivers on I-95—much less a "substantial portion of innocent drivers"—from reasonable suspicion.[24]

Second, the dissent claimed the majority inaccurately characterized I-95 as a major thoroughfare for drug trafficking because statistical evidence suggested that vehicles traveling northbound on I-95 in Maryland—the state where the defendant was initially stopped—are just as likely to contain drugs as vehicles traveling on any other road in that state.[25] Given the statistical data available to the court, the dissent argued that the majority should not have taken judicial notice of the proposition that I-95 is a major thoroughfare for drug trafficking.[26]

The dissent's third reason for determining that the officer lacked reasonable suspicion was that absent the improper judicial notice, the other factors—the defendant's nervous demeanor, rental agreement, irregular travel plans, cell phones, and driver's license—did not collectively establish reasonable suspicion to detain the defendant.[27] The majority should have accorded only minimal weight to the defendant's nervous demeanor because there was no evidence that

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of I-95 contradicted statistical evidence that northbound travelers on I-95 are not any more likely to be trafficking drugs than other travelers on Maryland roads. *Newland*, 246 F. App'x at 194 (Gregory, J., dissenting).

24. *See Newland*, 246 F. App'x at 196 (Gregory, J., dissenting).

25. *See id.* at 193 (Gregory, J., dissenting) (citing Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651, 658 (2002) (examining stop data compiled by the Maryland State Police)). Aside from the statistical evidence highlighted by the dissent, there are fundamental problems with taking judicial notice of I-95's reputation as a drug corridor. Courts traditionally take judicial notice of facts relating to history, government records, government personnel, and geography. *See* MCCORMICK ON EVIDENCE § 330 (Kenneth S. Broun ed., 6th ed. 2006). An example would be whether the property on which a crime occurred is subject to federal subject matter jurisdiction. *See* William M. Carter, Jr., *"Trust Me, I'm a Judge": Why Binding Judicial Notice of Jurisdictional Facts Violates the Right to Jury Trial*, 68 MO. L. REV. 649, 649 (2003). Traditionally noticed facts are easily distinguishable from broad characterizations of highways because parties do not need statistical evidence to verify the accuracy of traditionally noticed facts; rather, parties can consult government documents or maps to determine if judicial notice of those facts was proper.

26. *Newland*, 246 F. App'x at 194 (Gregory, J., dissenting). Past vehicle-search profiles created by the DEA bolster the dissent's argument because they "suggest[] that drugs travel[] south from New York City to the Baltimore/D.C. metropolitan area." Katherine Y. Barnes, *Assessing the Counterfactual: The Efficacy of Drug Interdiction Absent Racial Profiling*, 54 DUKE L.J. 1089, 1111 (2005) (citing David Kocieniewski, *New Jersey Argues That the U.S. Wrote the Book on Racial Profiling*, N.Y. TIMES, Nov. 29, 2000, at A1). Furthermore, a statistical study of vehicle searches on I-95 found that travelers driving south on I-95 in Maryland are 11.15 times more likely to traffic drugs than travelers driving north on the same stretch of highway. *Id.* at 1133. Indeed, southbound travel on I-95 was almost the only "statistically significant [variable] in predicting whether a stopped driver is a drug courier." *Id.*

27. *Newland*, 246 F. App'x at 196 (Gregory, J., dissenting).

the nervous demeanor was abnormally severe.[28] Furthermore, the rental agreement was only minimally probative of reasonable suspicion because the late return of rental cars does not necessarily suggest the commission of a crime.[29] Lastly, the majority should not have used the officer's testimony about the defendant's license to find reasonable suspicion because, upon examination of the license, the district court rejected the argument that the license was an "obvious fake" and excluded the license from its reasonable suspicion analysis.[30] Therefore, the dissent concluded that these factors show that the officer did not have reasonable suspicion absent the majority's improper use of judicial notice. Accordingly, the majority should have upheld the district court's suppression of the evidence found in the resulting search.

Newland demonstrates that the use of judicial notice in unpublished opinions increases the risk that judicial notice will improperly influence later decisions and create result-oriented precedent that the appellate court did not collectively analyze.

While the common law required litigating parties to present proof of each issue in their case, courts could take judicial notice of "facts about which reasonable men could not differ."[31] The underlying policy goals of judicial notice were two-fold: First, judicial notice allowed courts to decide issues without requiring adversarial argument, thereby reducing the administrative burdens on courts.[32] Second, limiting judicial notice to issues not reasonably disputable protected parties' right to dispute facts significantly influencing a case's outcome.[33]

Rule 201 of the Federal Rules of Evidence codifies a limited version of this common law doctrine.[34] Under Rule 201, judicially noticed facts cannot be "subject to reasonable dispute in that [they are] either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready

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28. *See id.* at 197 (Gregory, J., dissenting); *see also* United States v. Santos, 403 F.3d 1120, 1127 (10th Cir. 2005) (citing United States v. Williams, 271 F.3d 1262, 1268 (10th Cir. 2001)) ("Only extraordinary and prolonged nervousness can weigh significantly in the assessment of reasonable suspicion."); United States v. Richardson, 385 F.3d 625, 630–31 (6th Cir. 2004) ("[A]lthough nervousness has been considered in finding reasonable suspicion in conjunction with other factors, it is an unreliable indicator, especially in the context of a traffic stop. Many citizens become nervous during a traffic stop, even when they have nothing to hide or fear." (citing United States v. Mesa, 62 F.3d 159, 162 (6th Cir. 1995); United States v. Saperstein, 723 F.2d 1221, 1228 (6th Cir. 1983))); *Williams*, 271 F.3d at 1268 (noting that mere "nervousness is 'of limited significance'" in the reasonable suspicion inquiry, but that "[e]xtreme and continued nervousness . . . 'is entitled to somewhat more weight'" (quoting United States v. West, 219 F.3d 1171, 1179 (10th Cir. 2000))).

29. *See Newland*, 246 F. App'x at 198 (Gregory, J., dissenting).

30. *Id.* at 195 (Gregory, J., dissenting).

31. Dennis J. Turner, *Judicial Notice and Federal Rule of Evidence 201—A Rule Ready for Change*, 45 U. PITT. L. REV. 181, 181 (1983).

32. *See* Kenneth Culp Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 984 (1955).

33. *See id.*

34. Turner, *supra* note 31 (citing FED. R. EVID. 201).

determination by resort to sources whose accuracy cannot reasonably be questioned."[35]

Perhaps the most significant way in which Rule 201 is distinguishable from common law judicial notice is that the federal rule differentiates between "adjudicative" and "legislative" facts.[36] Professor Kenneth Culp Davis coined the terminology "adjudicative" and "legislative" facts to clarify how judicial notice should be limited.[37] Whether in a criminal or civil case, the trier of fact uses facts adjudicatively to make judgments that directly concern the parties, the circumstances of the case, and the background of the case[38]—"who did what, where, when, how, why, with what motive or intent."[39] In contrast, judges use facts legislatively to create "law or policy,"[40] such as whether certain conduct requires a standard of ordinary negligence or gross negligence.[41]

In formulating Rule 201, the Advisory Committee relied heavily on Davis's work.[42] The Committee determined that judicial notice of legislative facts should not be limited in the same way as judicial notice of adjudicative facts.[43] As a result, Rule 201 does not limit judicial notice of legislative facts, but only limits judicial notice of adjudicative facts.[44] Under Rule 201, judicial notice of adjudicative facts is limited to facts not subject to reasonable dispute because adjudicative facts directly affect the parties and therefore have a stronger impact on the case's outcome.[45] For example, using judicial notice of convict recidivism rates to determine whether a defendant is guilty—an adjudicative use—is much

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35. FED R. EVID. 201(b).

36. *See* FED. R. EVID. 201(a) advisory committee's note.

37. Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402–03 (1942).

38. *Id.* at 402.

39. 2 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 10.5 (4th ed. 2002).

40. Davis, *supra* note 37, at 402.

41. *See* United States v. Gould, 536 F.2d 216, 220 (8th Cir. 1976) ("A court generally relies upon legislative facts when it purports to develop a particular law or policy . . . ."). The distinction between adjudicative and legislative facts ultimately reflects how courts use those facts because a single fact often has adjudicative and legislative properties. Carter, *supra* note 25, at 662 ("Whether a fact is adjudicative or legislative depends not on the nature of the fact—e.g., who owns the land—but rather on the use made of it (i.e., whether it is a fact germane to what happened in the case or a fact useful in formulating common law policy or interpreting a statute) and the same fact can play either role depending on context." (quoting United States v. Bello, 194 F.3d 18, 22 (1st Cir. 1999))).

42. *See* FED. R. EVID. 201 advisory committee's note.

43. *Id.*

44. Fed. R. Evid. 201(a).

45. Turner, *supra* note 31, at 182. In addition to the explicit limits imposed on judicial notice, the 1974 alteration to Rule 201 reinforces that appellate courts should be cautious in taking judicial notice on appeal. The Advisory Committee imposed the requirement that a judge instruct the jury that judicial notice is not binding in criminal proceedings. FED. R. EVID. 201(g). The Committee reasoned that binding the jury to a judge's judicial notice would be improper in criminal trials because binding notice would conflict with the "spirit" of the constitutional right to a jury trial. FED. R. EVID. 201 advisory committee's note (quoting H.R. Rep. No. 93-650, at 6–7 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 7075, 7080). In addition, the judge's role in criminal trials is "limited to deciding issues of law and facilitating the jury's fact-finding." Carter, *supra* note 25.

more significant to the specific defendant's case than using recidivism rates to establish convict parole policy—a legislative use. In *Newland*, the court used I-95's drug trafficking reputation as an adjudicative fact because I-95's reputation affected whether the police officer had reasonable suspicion to search the vehicle.[46]

Because using judicial notice can influence the outcome of a case significantly—such as establishing a fact that, along with other facts, creates reasonable suspicion to detain a defendant during a routine traffic stop—recent developments in the operation of federal appellate courts suggests that courts should be particularly cautious in taking judicial notice, especially when writing unpublished opinions.

To address the "crisis of volume" in appellate court workloads,[47] federal appellate courts have attempted to allocate judges' time more efficiently by "using staff attorneys to screen cases, eliminating oral argument in many cases, relying on law clerks to draft opinions, and reducing the publication of opinions."[48] Over time, each circuit has also created different procedural rules prescribing when courts and attorneys could cite unpublished opinions.[49] In response, in 2006 Congress published Rule 32.1 of the Federal Rules of Appellate Procedure to streamline these differing rules.[50] Effectively, Rule 32.1 requires that appellate courts allow citation to federal unpublished opinions "issued on or after January 1, 2007."[51]

Whether appellate courts should allow citation to unpublished opinions is controversial because it forces courts to choose between two imperfect options. On one hand, appellate courts might devote more resources to unpublished opinions because of Rule 32.1, which could undermine the efficiency goal that these opinions serve.[52] On the other hand, appellate courts might devote the same minimal resources to develop unpublished opinions as they did before Rule 32.1 was enacted, despite the risk that unpublished opinions might create precedent even when those opinions provide little factual analysis or legal reasoning.[53] Neither of these options is preferable because courts do not want to eliminate the

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46. *See* United States v. Newland, 246 F. App'x 180, 193 (4th Cir. 2007) (Gregory, J., dissenting).

47. Pearson, *supra* note 2, at 1235 n.1 (citing COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FED. COURTS OF APPEALS, FINAL REPORT 14 TBL.2-3 (1998) [hereinafter STRUCTURAL ALTERNATIVES REPORT], *available at* http://www.library.unt.edu/gpo/csafca/final/appstruc.pdf). From 1974 to 2006, appellate filings increased from 19,657 filings per year to 66,618 filings per year. *Id.*; *see also* Boyeskie, *supra* note 2, at 961 (observing that appellate filings increased from 37,524 filings per year in 1988 to 66,618 filings per year in 2006) (citing FED. COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 10–28 (1990))).

48. Pearson, *supra* note 2, at 1235 (citing STRUCTURAL ALTERNATIVES REPORT, *supra* note 47, at 22 tbls.2-6 & 2-7, 23–24 tbl.2-8).

49. *Id.* at 1235–36.

50. Boyeskie, *supra* note 2, at 955 (citing FED. R. APP. P. 32.1).

51. *Id.* (citing FED. R. APP. P. 32.1).

52. *See* Hart v. Massanari, 266 F.3d 1155, 1178 (9th Cir. 2001).

53. *See id.*

efficiency of writing unpublished opinions nor do they want to risk citation to precedent that could influence future case law.

Before Rule 32.1, critics argued that appellate rules prohibiting the citation of unpublished opinions "created a 'secret' body of unpublished law" that removed court decisions from the principle of stare decisis.[54] Because stare decisis requires that courts treat similar cases alike, these critics argued that no-citation rules for unpublished opinions caused "seemingly arbitrary decision-making in the federal courts, and thereby violated one of the foundational principles of the American legal system."[55] Researchers also found that many courts were not limiting the use of unpublished opinions to "easy" cases.[56] Contrary to original intentions, an increasing number of unpublished opinions reversed lower court decisions,[57] and dissents and concurrences in unpublished opinions increased.[58]

Rule 32.1 lessens the concern that unpublished opinions will not comport with stare decisis, yet the failure to provide adequate reasoning in unpublished opinions diminishes courts' and attorneys' abilities to determine what the law is,[59] especially because courts continue to write unpublished opinions for

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54. Andrew T. Solomon, *Making Unpublished Opinions Precedential: A Recipe for Ethical Problems & Legal Malpractice?*, 26 MISS. C. L. REV. 185, 194 (2007); *see also* Sarah E. Ricks, *The Perils of Unpublished Non-Precedential Federal Appellate Opinions: A Case Study of the Substantive Due Process State-Created Danger Doctrine in One Circuit*, 81 WASH. L. REV. 217, 228 (2006) (arguing that non-precedential unpublished opinions create risks, including "doctrinal shifts from precedential decisions; uncertainty about the persuasive value of non-binding decisions by the hierarchically superior court; mistaken predictions of an opinion's future usefulness; and unpredictability of judicial outcomes"); Bradley Scott Shannon, *May Stare Decisis Be Abrogated by Rule?*, 67 OHIO ST. L.J. 645, 649 (2006) ("[Given] the fact that eighty-two percent of all federal court of appeals decisions are 'unpublished,' the reality is that stare decisis is now being abrogated with respect to tens of thousands of decisions each year."); Drew R. Quitschau, Note, Anastasoff v. United States*: Uncertainty in the Eighth Circuit—Is There a Constitutional Right to Cite Unpublished Opinions?*, 54 ARK. L. REV. 847, 878 (2002) ("[N]o-citation rule[s] clearly curtail[] litigants' rights by preventing citation of unpublished opinions and expands the power of the court by allowing it to ignore prior case law."); Marla Brooke Tusk, Note, *No-Citation Rules as a Prior Restraint on Attorney Speech*, 103 COLUM. L. REV. 1202, 1207 (2003) ("No-citation rules have effectively taken unpublished opinions outside the realm of stare decisis.").

55. Solomon, *supra* note 54.

56. *Id.*

57. *Id.* From 1978 to 2000, the number of unpublished opinions reversing lower court decisions rose from 1,018 to 2,156, increasing the percentage of unpublished opinions reversing lower court opinions from 14% in 1978 to 21% in 2000. *Id.* (citing Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. APP. PRAC. & PROCESS 199, 216 (2001)).

58. *Id.* at 195.

59. *See* Patrick J. Schiltz, *Response: The Citation of Unpublished Opinions in the Federal Courts of Appeals*, 74 FORDHAM L. REV. 23, 38 (2005). Furthermore, Rule 32.1 leaves the precedential value of unpublished opinions ambiguous because, as the committee notes, the Rule does not dictate how lawyers and courts should use unpublished decisions; it only pertains to citation of unpublished opinions. FED. R. APP. P. 32.1 advisory committee's note; *see also* Bryan Wright, Note, *But What Will They Do Without Unpublished Opinions?: Some Alternatives for Dealing with the Ninth Circuit's Massive Caseload Post F.R.A.P. 32.1*, 7 NEV. L.J. 239, 252 (2006)

difficult cases such as *Newland*.[60] Therefore, appellate courts should be hesitant to take judicial notice in unpublished opinions because of the risk that judicial notice will be used in ways that improperly influence the court's decisions. Furthermore, under Rule 32.1, one court may cite the use of judicial notice in a second court's opinion as support for its own judicial notice; however, improper judicial notice in the second court's opinion could ultimately influence the first court's final decision.

Newland's status as an unpublished opinion compounds its risk to future judicial decisions because courts now can cite unpublished opinions as precedent under Rule 32.1. Therefore, courts and parties may cite *Newland* in their reasonable suspicion analyses in future cases even though *Newland* may have mischaracterized precedent and improperly used judicial notice, leading to a result-oriented decision.

At least one court has cited *Newland* for the proposition that I-95 is a drug-trafficking thoroughfare. In *United States v. Gooden*,[61] the United States District court for the Eastern District of North Carolina decided a case similar to *Newland*.[62] *Gooden* was an unpublished opinion that considered whether a police officer had reasonable suspicion to extend the duration of a traffic stop to search a defendant's vehicle on I-95.[63] Like the defendant in *Newland*, the defendant in *Gooden* provided the police officer with fake identification from Jamaica and a rental agreement signed by someone other than the defendant.[64] Holding that the vehicle search was constitutional regardless of whether the defendant consented to the search, the *Gooden* court found that the officer had reasonable suspicion to extend the traffic stop and search the vehicle.[65] In finding reasonable suspicion, *Gooden* cited *Newland*'s recognition that I-95 is "'a major thoroughfare for narcotics trafficking' and [that] other cases from the court of appeals and district courts have long recognized this fact in reasonable suspicion analyses."[66] Thus, *Newland*'s improper use of judicial notice and mischaracterization of precedent

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(citing Letter from Samuel A. Alito, Jr., Chair, Advisory Comm. on Appellate Rules, to Anthony J. Scirica, Chair, Standing Comm. on Rules of Practice & Procedure 30 (Dec. 6, 2002), *available at* http://www.uscourts.gov/rules/Reports/AP12-2002.pdf) (arguing that the Rule's language "does not address what precedential value should be given to unpublished opinions" and noting that the Rule's Committee Note states that the rule does not take a position on that point). Nevertheless, courts will use unpublished opinions as precedent because they will be reluctant to ignore previous holdings of the court. Schiltz, *supra*, at 40 (citing Letter from John L. Coffey et al., Circuit Judges, U.S. Court of Appeals for the Seventh Circuit, to Samuel A. Alito, Jr., Chair, Advisory Comm. on Appellate Rules 1 (Feb. 11, 2004), *available at* http://www.uscourts.gov/rules/Appellate_Comments_2003/03-AP-396.pdf).

60. *See* Solomon, *supra* note 54, at 194.

61. No. 5:06-CR-313-FL, 2007 WL 1875544, at *1 (E.D.N.C. June 27, 2007).

62. *See id.*

63. *Id.* at *3.

64. *Id.* at *1.

65. *Id.* at *3–4.

66. *Id.* at *3 (quoting United States v. Newland, 246 F. App'x 180, 188 (4th Cir. 2007)).

directly affected the reasonable suspicion analysis in *Gooden* even though *Newland* was an unpublished opinion.

Newland demonstrates why parties and courts in the Fourth Circuit should be aware of the effect of judicial notice on the outcomes of cases, especially when those decisions become unpublished opinions. Although judicial notice and unpublished opinions increase efficiency in the judicial process, using judicial notice in unpublished opinions further increases the risk that a court will improperly accept as fact some propositions on which reasonable minds may disagree. Furthermore, a case's status as an unpublished opinion is no longer a shield that prevents the case from affecting future decisions because current appellate rules allow courts to cite unpublished opinions, risking future use of unpublished precedent even though judicial notice improperly influenced that precedent.

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